

Liability and statutory defence in Queensland



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Presentation

- Negligence refresher
- Section 22 *Civil Liability Act 2003* defence
- Impact for practice

Context

- Increasing client awareness of valuer's duty of care
 - *Webb Resolutions Ltd v E.Surv Ltd* [2012]
 - *Provident Capital Limited v John Virtue Pty Ltd (No 2)* [2012]
 - Including disciplinary actions: *Valuers Registration Board of Qld v Conroy* [2013] QCAT 688

combined with

- Post-GFC 'drops' in value!



Duty owed by valuers

- Duty of care owed to use reasonable care and skill
 - Standard of care required of a reasonably prudent and competent valuer
 - Limited by terms of retainer
 - Usually restricted to the present value of the property
 - Usually does not extend to advice regarding future movements

Duty owed to ...

*“It is settled law that a [valuer] **owed a duty of care to the person who had requested the valuation**. The duty is to take reasonable care as a trained professional valuer to give a reliable informed opinion on the open market value of the land in question at the date of valuation. **It is also now settled that a valuer may owe a duty of care to a third party receiving a valuation containing a negligent misstatement which causes economic loss**. For example, in this case, the finance company or companies which Mr Conroy acknowledges on the face of the valuations are entitled to rely on the valuations.”* (internal references omitted)

Valuers Registration Board of Queensland v Conroy [2013] at [27]

(also see - *Webb Resolutions Ltd v E.Surv Ltd* [2012] at [5])

Duty owed to ...

- Kovarfi v BMT & Associates Pty Ltd (No. 2) [2014] NSWSC 100

*“ There is no issues before me that, at least arguably, the first and second plaintiffs as **guarantors** of the indebtedness of the company may be **owed a duty of care by the valuers appointed by the bank** in the performance of their work.”*

per Campbell J at [5]

Breach

- A failure to exercise duty = breach
 - Matter for determination by the Court
 - Absent an actual act of negligence, a finding of breach can be difficult to maintain
 - Valuer not *usually* liable for subsequently declining property valuers
 - depends on the retainer terms
 - defence in some Australian jurisdictions for a valuer who acts in a 'professional manner'
- For client to recover \$\$ against valuer damages must follow breach

Declining values

“Ordinarily ... the valuer will not be liable for the monetary difference between true value of the property and any lesser price obtained because of a market decline, notwithstanding that declines in market values are reasonably foreseeable in a general way. The reason for this conclusion is that, in so far as a decline in the market was reasonably foreseeable, it will already be factored into the assessment of the true value of property as at the date of valuation. In so far as the market decline was not reasonably foreseeable, any loss arising from the decline must be regarded as outside the contemplation of the parties to the valuation arrangement and not recoverable in an action for negligence or breach of contract.”

Kenny & Good Pty Ltd v MGICA [1999] per McHugh J at [48]

Negligence?

- *Vero Lenders v Taylor Byrne Pty Limited* [2006] FCA 1430
 - Vicarious liability of firm for employed valuer's negligence
 - Here no negligence
- *Adwell Holdings Pty Ltd v Mark Smith* [2003] NSWCA 103
 - Within 10% of true value acceptable ≠ negligence

Negligence?

- *Genworth Financial Mortgage Insurance v Hodder Rook & Associates* [2010] NSWSC 1043
 - Expert – one valuation exceeded true value by 26% the other by 17%
 - Evidence that lender would not have lent on true values
 - Valuer negligent
- *La Trope Capital & Mortgage Corp Ltd v Hay Property Consultants Pty Ltd* [2011] FCAFC 4
 - Substantial overvaluation = negligence



Defence

Civil Liability Act 2002 (Qld):

22 Standard of care for professionals

(1) A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a **significant number** of **respected** practitioners in the field as competent professional practice.

(2) However, peer professional opinion can not be relied on ... if the court considers that the opinion is irrational **or** contrary to a written law.

(3) ... that there are differing peer professional opinions widely accepted by a significant number of respected practitioners in the field ... does not prevent any 1 or more (or all) of the opinions being relied on...

'Process'

Court determines whether:

1. Does negligence exist?

If 'yes':

2. Is a statutory defence established.

If 'yes':

3. Should the defence be refused on grounds of *irrationality* or being *contrary to a written law*?

Application

Defendant to prove (by specific pleading evidence):

- What the relevant practice was at the time of the valuation; and
- That this was accepted as *competent professional practice* by *peer professional opinion*; and
- That it was not *irrational*; and
- That it was not *contrary to a written law*; and
- That the **accepted** practice was the **actual** practice engaged in by the valuer at the time.

Competent professional practice?

- Need to provide evidence to court what exactly the practice was at the time
- Specifics of what should occur

Widely accepted

- Needs to be accepted by a broad cross section of experts
 - Does not mean by a majority
 - Arguably not restricted to Australia
- Issues could arise where due to circumstances practices vary from region to region

Not irrational

UGL Rail Pty Ltd v Wilkinson Murray Pty Ltd [2014] NSWSC 1959

- Ball J at [141]:

Wilkinson Murray was negligent because it put forward recommendations concerning the acoustic panelling that should be installed in a way that suggested those recommendations were reliable and had a rational basis, whereas any acoustic engineer acting with reasonable care and skill would have appreciated they were not and did not.

Does actual = accepted?

- Need to prove to Court actual = accepted
- How?
 - Checklists?
 - Processes?
 - Diary notes?
 - Physical diary?
 - Evidence of others
 - *Smythe v Burgman (No 2)* [2015] NSWSC 1959
 - Recording only of 'abnormal' findings accorded with practice
- Relevant time that of providing services

Proof of use of practice

- If cannot prove actually engaged in accepted practice cannot rely on the defence
- Need to evidence that considered particular facts of the 'brief'
 - *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505, [560] per Young CJ:
 - *"The problem ... is that the only inference that I can draw ... is that he did not turn his mind to the possible problems and just used the form as a matter of rote..."*
 - Use of 'common form of mortgage' without sufficient consideration of its appropriateness
 - Solicitors held to be negligent



Other possible defence(s)

- Contributory negligence?
 - Section 23(2) CLA
 - Standard of care is
 - that of a *“reasonable person in the position of”* the plaintiff; and
 - *“The matter is to be decided on the basis of what that person knew or ought reasonably to have known at the time.”*
 - Objective determination (test)

Amount of contribution?

- Section 24 = reduction may be $\geq 100\%$ *“if the court considers it just and equitable to do so”*
 - Application in practice likely to be rare
- *Angas Securities Ltd v Valcorp Australia Pty Ltd* (2011)
277 ALR 538
 - Lender found to be 25% contributorily negligent for failing to make proper inquiries re borrowers' ability to service the loan



Considerations

Defences not consistently worded throughout Australia:

SA, NSW & Tas – opinion must be “*widely accepted in Australia*”

Also:

ACT and NT – no statutory defence

WA – statutory defence limited to “*health*” professionals

ACT, NT and WA = common law defence (if any)

For the future

- Review 'practices'
- Proactively managing client expectations
- Managing insurer's expectations and your (insured's) obligations
- Ensuring you always act in a professional manner and follow best practice

Contact Details



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